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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1031

DANIEL LOVALL SPIGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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This is a Petition for Rehearing of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit heretofore filed by the Petitioner. Since the filing of the original Petition for Writ of Certiorari, an intervening circumstance of substantial and controlling affect, has occurred,[1] namely, the discovery by Petitioner's counsel of the decision in the case of *United States v. Jackson*, 262 F.Supp. 716 (D.Conn., Jan. 9, 1967).[2]

[1] See e.g., Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34, footnote 1, 50 Sup.Ct. 9, 10, 74 L.Ed. 147; Massey v. United States, 291 U.S. 608, 54 Sup.Ct. 532, 78 L.Ed. 1019; and Schrieber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50, 59 Sup.Ct. 8, 9, 83 L.Ed. 34, 35.

[2] Counsel for Petitioner is informed that the Jackson case has been appealed directly to this Court pursuant to the provisions of Title 18, U.S.C. §3731.

Petitioner herein incorporates by reference the jurisdictional citations, Statement of the Case, Statutes and Constitutional Provisions Involved and Statement of the Facts set forth in his original Petition for Writ of Certiorari.

New Question Presented

In addition to the questions set forth in his original Petition, and in light of the decision in *United States v. Jackson, supra,* the following new and novel question is presented:

> Whether Title 21, U.S.C. §176(a)[3] is unconstitutional in violation of Amendment VI to the United States Constitution in that it impairs a defendant's free exercise of his right to trial by jury.

Argument

In *United States v. Jackson, supra,* the provisions of Title 18, U.S.C. §1201(a) were before the Court for interpretation. That section provides in pertinent parts, as follows:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully seized, . . . kidnaped . . . or carried away and held for ransom or reward or otherwise, . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of

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[3] The relevant portion of Title 21 U.S.C. §176(a) provides:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

the jury shall so recommend, or, (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

It is respectfully submitted that almost identical considerations are present in connection with the statute involved in the instant case (Title 21 U.S.C. §176(a)) as were involved in *Jackson*. Thus, in a trial by the court sitting without a jury, even if a defendant charged with a violation of §176(a) is shown to have been in possession of the contraband, he apparently is under no obligation to "explain his possession" to anyone's satisfaction. Said in another way, the presumption arising from mere possession of the contraband apparently does not exist in a non-jury trial.[4]

It can be readily seen, therefore, that by exercising his absolute right to a jury trial (Amendment VI, United States Constitution) the defendant must accept the responsibility of explaining his possession of the contraband to the satisfaction of the jury, an onus which he is not subject to if he waives trial by jury.

Finally, but most significantly, it must be noted that the Government has an absolute right to demand a jury trial even if the defendant desires to waive that right. *Singer v. United States*, 380 U.S. 24, 85 Sup.Ct. 783, 13 L.Ed.2d 630. Accordingly, by refusing to waive jury, the Government may actually force upon the defendant

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[4] The conclusion that the defendant does not have the obligation to explain his possession of the contraband to anyone's satisfaction in a non-jury trial is buttressed by the fact that §176(a) provides that the defendant must "explain his possession to the satisfaction of the *jury*." (Emphasis added). The section does *not* say that the defendant must explain his possession to the satisfaction of the *trier of fact*.

the burden of explaining his possession of the contraband to the satisfaction of the jury.

Conclusion

Based on the foregoing, and on the arguments set forth in the original Petition for Writ of Certiorari, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and that the Judgment of the Circuit Court affirming the Judgment of the District Court should be reversed.

Respectfully submitted,

MARKS & SCHNEIDER

By BURTON MARKS

Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Burton Marks, counsel for the Petitioner herein, certify that the attached Petition for Rehearing of the Petition for Writ of Certiorari to the United Court of Appeals for the Ninth Circuit is presented in good faith and not for delay. I further certify that the said Petition for Rehearing is restricted to the grounds specified therein.

BURTON MARKS